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NO. 82-832

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN B. SHUPPER,

Petitioner,

-vs-

COMMITTEE ON CHARACTER AND FITNESS OF THE SUPREME COURT OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENT IN OPPOSITION

DANIEL R. McLEOD
Attorney General

C. TOLBERT GOOLSBY, JR.*
Deputy Attorney General

KENNETH P. WOODINGTON
Senior Assistant
Attorney General

HELEN T. ZEIGLER
Assistant Attorney General

Post Office Box 11549
Columbia, S. C. 29211
(803) 758-8667

ATTORNEYS FOR RESPONDENT

*Counsel of Record

QUESTIONS PRESENTED

I.

Whether the denial by the South Carolina Supreme Court and its Committee on Character and Fitness of petitioner's application to take the South Carolina bar examination after the petitioner was apprised of the matters concerning the Committee and was given an opportunity to discuss those matters with the Committee, deprived him of due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments.

II.

Whether under the facts presented in this case there has been a denial of procedural due process as defined by the Court in Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963).

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CASES:

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). 8

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963). . . . . i, 8-15

STATUTORY PROVISIONS:

Rule 5 Rules for the Examination and Admission of Persons to Practice Law in South Carolina. . 1, 6

Rule 6 Rules for the Examination and Admission of Persons to Practice Law in South Carolina. . 2, 6, 7 .

OPINIONS BELOW

The decision of the Committee on Character and Fitness is set out in the Appendix of the Petition at 3a.

The Order of the South Carolina Supreme Court on petitioner's Petition is set out in the Appendix of the Petition at 1a.

The Order of the South Carolina Supreme Court on petitioner's Petition for rehearing is set out in the Appendix of the Petition at 2a.

JURISDICTION

The respondent does not question the Court's jurisdiction in this proceeding.

STATUTES INVOLVED

Rule 5A(2), Rules for the Examination and Admission of Persons to Practice Law in South Carolina, is set out in the Appendix of the Petition at 5a.

Rule 6, Rules for the Examination and Admission of Persons to Practice Law in South Carolina, is appended hereto at 1a.

STATEMENT OF THE CASE

On April 1, 1982, petitioner filed with the Clerk of the South Carolina Supreme Court an application to take the July bar examination. Pursuant to Rule 6A of the Rules for the Examination and Admission of Persons to Practice Law in South Carolina, a copy of petitioner's application was delivered to the Committee on Character and Fitness for certification of, inter alia, the petitioner's character qualifications. [App. at 1a.] In responding to question 16 of the application[1/]

[1/] Question 16 of the Application asks for a list of all suits in equity, actions at law, suits in bankruptcy or other statutory proceedings, matters in probate, lunacy, guardianship and every other judicial proceeding of every nature or kind, fraud, formally or informally in any civil proceeding to which the applicant has been a party.

the petitioner disclosed that he had been arrested in 1973, incarcerated for 8 1/2 months, and that his conviction was subsequently set aside by Order of the South Carolina Supreme Court in September of 1975. [R., Application.] Attached to the application were orders and other documents regarding this response which revealed that the petitioner had been convicted and sentenced for simple possession of hashish and simple possession of LSD in 1973, and the conviction was appealed to the South Carolina Supreme Court where it was affirmed. The petitioner subsequently filed an application for post-conviction relief which was denied, and this decision was appealed to the South Carolina Supreme Court. The State joined in the petitioner's request that the verdict of the jury be set aside and a new trial granted. Accordingly, the South Carolina Supreme Court granted the application for

post-conviction relief and remanded the case for further proceedings. The attachments further revealed that since the petitioner had substantially complied with his original sentence, no further action was taken against him. His record was, thereafter, expunged. [R., Application.]

On May 19, 1982, a letter was sent from the Clerk of the South Carolina Supreme Court to the petitioner at the request of the Committee on Character and Fitness asking for further information concerning the petitioner's 1973 conviction and subsequent proceedings relating thereto. [R., Letter of May 19, 1982.] Petitioner responded by letter dated May 31, 1982, and provided the information sought. This letter revealed that the State joined in the petitioner's application for post-conviction relief due to a possible defect in the search warrant which was used to search petitioner's apartment. [R., Letter of

May 31, 1982.] Thereafter, by letter dated June 9, 1982, petitioner was notified that the Committee on Character and Fitness wished to personally interview him to discuss further the matters involving his 1973 arrest. A time and place was provided in the notice for this meeting. [R., Letter of June 9, 1982.]

The Committee on Character and Fitness met with the petitioner on June 17, 1982, and the proceedings were transcribed by a circuit court reporter. [R., Transcript.] The transcript of that meeting consists of forty-two pages of testimony concerning the single subject of the events and proceedings surrounding the petitioner's 1973 arrest.

By letter dated July 14, 1982, the petitioner was notified that his application to take the bar examination had been denied by the Committee on Character and Fitness on the basis that he did not establish to the satisfaction of the

Committee that he was a person of good moral character as required by Rule 5A(2). [App. to Petition at 3a.] This letter further provided notification of the right to petition the Supreme Court for a review of the Committee's determination. [R., Letter of July 14, 1982.]

A Petition for Review and supporting memorandum were filed with the South Carolina Supreme Court pursuant to Rule 6C of the Rules for the Examination and Admission of Persons to Practice Law in South Carolina on July 23, 1982. The petitioner asked for a review of the finding of the Committee on Character and Fitness as set forth in the letter of July 14, 1982, referred to above. [R., Petition Under Rule 6C of the Rules for the Examination and Admission of Persons to Practice Law in South Carolina.] The supporting memorandum primarily addressed the substantive issue of the petitioner's

1973 conviction being used as a basis for denying him permission to take the bar examination. [R., Submission and Memorandum in Support of Petition Under Rule 6C of the Rules of Examination and Admission of Persons to Practice Law in South Carolina.] The petitioner was notified on August 2, 1982, that his Petition for Review was denied by the South Carolina Supreme Court. [App. to Petition at 1a.]

A Petition for Rehearing was thereafter filed by the petitioner with the South Carolina Supreme Court on August 11, 1982. [R., Petition for Rehearing.] By letter dated August 18, 1982, the petitioner was informed that the Petition for Rehearing was denied by the Court. [App. to Petition at 2a.]

ARGUMENT

A review of the record of the proceedings

below reveals that the decision of the South Carolina Supreme Court does not conflict with prior decisions of this Court. There is no dispute that previous decisions of this Court have held that procedural due process requirements must be met before a state can exclude a person from practicing law. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). The only issue, therefore, is whether the petitioner has been afforded procedural due process under the facts of this case.

Petitioner bases his argument that the requirements of procedural due process have not been met in this case on the court's decision in Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963). Although the Willner case was concerned with the same general issue as that involved here, there are important factual distinctions in this case that render it inappropriate for exact comparison. When these factual

distinctions are viewed in light of the Willner holding, it becomes apparent that the petitioner has been provided procedural due process.

The Willner case concerned an applicant for admission to the New York bar who had passed that state's bar examination but had failed to obtain a certificate of good character from the Committee on Character and Fitness. The petitioner in that case alleged that the Committee considered complaints and accusations made against him by persons whom he was not allowed to confront and cross-examine, and that he was not given the opportunity to refute the accusations of his accusers. The Court stated in recounting the facts of the case:

> Petitioner alleged that in connection with his hearings before the Committee on his 1973 application he was shown a letter containing various adverse statements about him from a New York attorney;

> that a member of the Committee promised him a personal confrontation with that attorney; but that the promise was never kept. Petitioner also alleged that he had been involved in litigation with another lawyer who had as his purpose 'to destroy me'; that the secretary of the Committee was taking orders from that lawyer and that two members of the Committee were 'in cahoots' with that lawyer.
>
> Id. at 101.

Since it appeared from the Record that the Committee considered several complaints against Willner from witnesses he was not allowed to confront and concerning matters he was not allowed to rebut, and relied on these complaints in reaching its decision, the Court concluded that he had been denied procedural due process. The Court stated:

> ... But because respondent has asserted that the ex parte statements involved in this case played no part in any of the decisions below, we have searched the record to assess this contention. It shows that the Committee had several complaints against petitioner. The various intra-Committee

> memoranda and reports to the Appellate Division contained in this record support the conclusion that the Committee did in fact rely on these complaints, at least to some extent, in reaching its determination.
>
> Id. at 105, 106.

In predicating its decision that Willner should have been allowed a hearing on the existence of these factors, the Court narrowed the direct applicability of its holding and emphasized the importance of factual distinctions in deciding questions of procedural due process.

As the Statement of the Case reveals, a very different factual scenario is presented in this case. Here, it is obvious from a review of the record that the petitioner was fully apprised of the matter concerning the Committee on Character and Fitness. The letter of May 19, 1982, which petitioner received from the Clerk of the South Carolina Supreme Court written on behalf of the

Committee contained questions relating only to petitioner's 1973 arrest and proceedings stemming therefrom. When petitioner was subsequently requested by letter dated June 9, 1982, to appear before the Committee, the stated purpose of the meeting was "to discuss further the matters involving your 1973 arrest." [R., Letter of June 9, 1982.] During this meeting, the Committee questioned the petitioner only about matters concerning the 1973 arrest and related proceedings. [R., Transcript.] An examination of the Record shows, furthermore, that the only evidence which the Committee had to consider was that supplied by the petitioner, and that the petitioner was given the opportunity to discuss and explain that evidence in his meeting with the Committee.

This differs widely from the situation which the Court confronted in Willner wherein matters with which that petitioner

was not confronted were relied upon by the Committee in making its determination. In this case, an examination of the entire record will reveal that throughout its proceedings regarding the petitioner, the Committee was concerned with only one subject. For the petitioner to now claim that he does not know the reason for the Committee's unfavorable decision is to ignore the entire record below.

In extending procedural due process to bar applicants, the Willner case requires only that an applicant be apprised of the reasons for a Committee's failure to be convinced of his good character and, depending upon the nature of the evidence against him, to be given some type of hearing thereon. These requirements are best stated in the concurring opinion as follows:

> The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is

to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence. As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required.

* * *

The circumstances will determine the necessary limits and incidents implicit in the concept of a 'fair' hearing. Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain.

Id., 107-108.

In Willner, the Court agreed that the petitioner had been apprised of the matters the Committee was considering. Since these matters included information not supplied by the petitioner, a hearing was required to give the petitioner an opportunity to rebut this information.

Here, the petitioner was also apprised of the matters which the Committee was considering. However, those matters concerned only information supplied by the petitioner, and the petitioner was given the opportunity to discuss the matters with the Committee. A review of the record reveals clearly the basis of the Committee's decision. There was nothing to be accomplished by any further hearing of the matter. We maintain that under the facts of this case, the procedure afforded the petitioner fully complies with the procedural due process requirements set forth in decisions of this Court.

CONCLUSION

For the foregoing reasons, we maintain that the decision below does not conflict with prior decisions of the Court, and that the Court should deny the Petition for writ of certiorari.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

C. TOLBERT GOOLSBY, JR.*
Deputy Attorney General

KENNETH P. WOODINGTON
Senior Assistant
Attorney General

HELEN T. ZEIGLER
Assistant Attorney General

Post Office Box 11549
Columbia, S. C. 29211
(803) 758-8667

ATTORNEYS FOR RESPONDENT

*Counsel of Record

RULES FOR THE EXAMINATION AND ADMISSION OF PERSONS TO PRACTICE LAW IN SOUTH CAROLINA

Rule 6

Application for admission

A. Any person desiring to take the bar examination for the first time shall file an application in triplicate, on a form prescribed by the Committee on Character and Fitness, with the Clerk of the Supreme Court. Such application shall be filed not sooner than February 1st nor later than April 1st for the July examination and not sooner than September 1st nor later than November 1st for the February examination. Each application shall be accompanied by a fee of sixty dollars ($60.00), provided in the case of an applicant who has been admitted to the practice of law in any other State, Territory or District of Columbia, for more

than one year, the application shall be accompanied by an additional fee to cover the Character Report to be obtained from the National Conference of Bar Examiners. Each applicant shall be required to give a full and direct answer, subscribed and sworn by him before some officer authorized to administer oaths, to each of the questions required by the Committee on Character and Fitness. The Clerk shall deliver one application to the Committee on Character and Fitness who shall, not later than July 1st for the July examination and February 1st for the February examination, certify to the Clerk of the Supreme Court whether or not the applicant possesses the qualifications as to age, character, residence and legal education prescribed by Rule 5. The Committee shall further, as soon as practicable, notify the applicant whether his application has been accepted or rejected.

B. In the event any applicant has an important problem in regard to his character which he deems might possibly ultimately disqualify him from membership in the Bar, he may request permission to have the matter resolved by filing a provisional application at any time after the applicant has been accepted as a student in an approved law school. The request shall be made on a form prescribed by the Committee on Character and Fitness, and shall be filed in triplicate with the Clerk of the Supreme Court. Each request must be accompanied by a non-refundable fee of fifty dollars ($50.00). Each applicant shall be required to give a full and direct answer, subscribed and sworn to by him before some officer authorized to administer oaths, to each of the questions required by the Committee on Character and Fitness. If the Committee is of the opinion that an early investigation of the applicant's character would be

proper, it may begin an immediate investigation. The Committee shall, as soon as practicable, notify the applicant of its determination. An applicant who has some question concerning qualification for admission to the Bar is encouraged to make early application upon admission to law school. No adverse inference concerning an applicant's character and fitness shall be drawn by reason of an applicant having filed a provisional application. The filing of a provisional application shall not relieve an applicant from fully qualifying in all respects under these rules, including the requirement of filing a final application to take the bar examination, to again pay the required fee and to obtain the final approval of the Committee on Character and Fitness as in other cases.

C. Any applicant dissatisfied with the recommendation of the Committee on Character and Fitness concerning his

character may petition the Supreme Court for review. Such petition must be filed with the Clerk of the Supreme Court within ten (10) days after receipt of notice of the Committee's recommendations.

D. Any applicant who has been refused favorable character recommendation by the Committee on Character and Fitness or whose petition filed pursuant to paragraph 6C has been denied, may petition the Supreme Court, showing sufficient rehabilitation to warrant a review of the Committee's finding or re-evaluation by the Court of its final action. Such petition may be filed not sooner than two (2) calendar years from the date of the Committee's adverse recommendation or the date the Court entered final action, whichever is later. This Rule shall not be construed to prohibit an applicant who was denied favorable recommendation solely because of residency requirements from re-applying in less than two (2) years.